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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/774,658

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Robert G. Cole

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EXAMINER

POLLACK, MELVIN H

ART UNIT

PAPER NUMBER

2445

MAIL DATE

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09/28/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/774,658	<b>Applicant(s)</b> COLE ET AL.	
	<b>Examiner</b> MELVIN H. POLLACK	<b>Art Unit</b> 2445	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 15 July 2009.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 05 February 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 15 July 2009 has been entered.

### ***Response to Arguments***

2. Applicant's arguments with respect to claims 1-19 have been considered but are moot in view of the new ground(s) of rejection.

3. In response to applicant's argument that the claims are about administrators finding bad devices while Bradley is about clients monitoring SLA agreements and Basturk is about load balancing and cost analysis, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

4. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., that the network manager determines what to measure, determining which router is in violation, etc.) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Applicant is reminded that he must

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read the claims in the broadest reasonable interpretation to one of ordinary skill in the art, and the examiner finds the current claims to have broad interpretations.

5. However, for the sake of advancing prosecution, examiner has modified the rejection to add new art detailing administrator setup and to flesh out degradations (running tallies of errors) in order to determine failing devices.

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 1-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bradley et al. (7,082,463) in view of Basturk (7,111,074).

8. Bradley teaches a method and system (abstract) of determining gateway performance and SLA information (col. 1, line 1 – col. 5, line 15; col. 36, line 55 – col. 68, line 20) wherein a management server connected to router devices (col. 5, lines 15-30) and controlled via a web interface (col. 5, lines 30-35) wherein path measurements are collected and stored within a matrix (col. 5, line 35 – col. 6, line 10; col. 6, line 65 – col. 7, line 5). Test result overlaps are tracked, as are start and end times (col. 8, line 40 – col. 9, line 30). The system tracks threshold and problem information (col. 9, line 30 – col. 21, line 30), including R-Factor equivalent VoIP voice quality data (col. 21, line 30 – col. 24, line 60), and of data manually entered into the matrix (col. 24, line 60 – col. 31, line 15) and reported as a source x destination router report (col. 31, line 10 – col. 34, line 50, esp. col. 33, lines 30-35 and col. 34, lines 5-15).

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9. Bradley teaches at the very least tracking a number of said degradation over a period of time for two routers forming a path, wherein the degradation of each specific router would be determinable by one of ordinary skill in the art with a predictable result that is obvious to try. Bradley does not expressly disclose tracking for a specific router per se. Basturk teaches a method and system (abstract) of making quality measurements on a path in a VoIP network (col. 1, line 1 – col. 4, line 65; col. 9, line 50 – col. 10, line 65) wherein a particular router is charged and tracked (col. 5, line 20 – col. 6, line 30) such that the tracked degradation is provided to underperforming routers (col. 7, line 25 – col. 9, line 50). At the time the invention was made, one of ordinary skill in the art would have added Basturk to Bradley in order to improve load balancing in a case of multiple paths (col. 2, lines 20-30).

10. Bradley and Basturk do not expressly disclose taking measurements on each path of all paths within the network. Huang teaches a method and system (abstract) of using an administrator client to monitor an entire network (col. 1, line 1 – col. 2, line 35; col. 13, line 60 – col. 14, line 15), including paths between routers (col. 2, lines 35 – 45; col. 7, line 25 – col. 9, line 15) and to detect the failure of a single device (col. 3, line 1 – col. 4, line 20) using a degradation system called NAF (col. 4, lines 15 – 30; col. 9, lines 15 - 30) under the control of the administrator (col. 5, line 60 – col. 6, line 60). At the time the invention was made, one of ordinary skill in the art would have added Huang in order to better track failure data (col. 1, lines 35 – 45).

11. For claim 9, Bradley teaches several threshold values, including 75 (col. 32, lines 35-55), but does not expressly declare 70 as a threshold value.

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12. Examiner takes Official Notice (see MPEP § 2144.03) that a changed threshold in a computer networking environment was well known in the art at the time the invention was made. Both models are standard techniques equally effective in determining a threshold crossing. The substitution would have been obvious to one of ordinary skill in the art at the time of the invention as the particular threshold value is irrelevant, as each is a standard technique used by the ordinary artisan and both have been recognized to provide a good estimate. Therefore, the motivation to change the threshold value remains personal preference.

13. The Applicant is entitled to traverse any/all official notice taken in this action according to MPEP § 2144.03. However, MPEP § 2144.03 further states "See also *In re Boon*, 439 F.2d 724, 169 USPQ 231 (CCPA 1971) (a challenge to the taking of judicial notice must contain adequate information or argument to create on its face a reasonable doubt regarding the circumstances justifying the judicial notice)." Specifically, *In re Boon*, 169 USPQ 231, 234 states "as we held in *Ahlert*, an applicant must be given the opportunity to challenge either the correctness of the fact asserted or the notoriety or repute of the reference cited in support of the assertion. We did not mean to imply by this statement that a bald challenge, with nothing more, would be all that was needed". Further note that 37 CFR § 1.671(c)(3) states "Judicial notice means official notice". Thus, a traversal by the Applicant that is merely "a bald challenge, with nothing more" will be given very little weight.

14. The specific value of the threshold does not patentably distinguish the claimed system. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide any threshold value in the system taught by Bradley because the subjective interpretation of the optimal threshold value does not patentably distinguish the claimed invention.

### ***Conclusion***

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15. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MELVIN H. POLLACK whose telephone number is (571)272-3887. The examiner can normally be reached on 8:00-4:30 M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vivek Srivastava can be reached on (571) 272-7304. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Melvin H Pollack/  
Examiner, Art Unit 2445  
24 September 2009